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9

10 **IN THE UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 DAVID VACCARO) Case No.: **'12CV0924 W WMc**
13 ,)
14 Plaintiff,)
15 vs.)
16 STERLING JEWELERS, INC., an Ohio)
corporation d/b/a KAY JEWELERS)
17 Defendant.)
18 _____)

19 COMPLAINT
20 47 U.S.C. §277 et seq
21 DEMAND FOR JURY TRIAL

22 **INTRODUCTION**

23 1. This is an action for actual damages, statutory damages, attorney fees and costs
24 brought by an individual consumer, David Vaccaro, (hereinafter "Plaintiff") for Sterling
25 Jewelers, Inc.'s d/b/a Kay Jewelers (hereinafter referred to as "Kay Jewelers" or "Defendant")
26 violations of the Telephone Consumer Protection Act, 47 U.S.C. §277 et seq, (hereinafter
"TCPA")¹ which prohibits the making of unconsented to phone calls to cell phones.

27 2. Plaintiff makes these allegations on information and belief, with the exception of
28 those allegations that pertain to Plaintiff, or to plaintiff's counsel, which Plaintiff allege on
personal knowledge.

29 _____
30 ¹ All undesignated section references to 47 U.S.C. §277 are to the TCPA

3. While many violations are described below with specificity, this Complaint alleges violations of the statutes cited in their entirety.

JURISDICTION AND VENUE

4. This action arises out of Defendant's violations of the TCPA. As Defendant, at all times relevant herein, was doing business in the County of San Diego, State of California, at numerous different locations, and committed the acts that form the basis for this suit in the state of California, this Court has personal jurisdiction over Defendant for purposes of this action.

5. Jurisdiction arises pursuant to 28 U.S.C. § 1337(a), and 47 U.S.C. §277 et seq.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c).

THE PARTIES

7. Plaintiff is a natural person residing in Los Angeles County, California.

8. Plaintiff is a “person” as defined by *47 U.S.C. §153(32)*.

9. Defendant is believed to be an Ohio corporation with its principal place of business at 375 Ghent Road, Akron, Ohio 44333. Defendant Sterling can be served through its registered agent for service of process Dimche Kostrevski 38 South Hamilton Road, Columbus Ohio 43213.

10. Defendant is, and at all times mentioned herein was a “person,” as defined by 47 U.S.C. § 153(32).

FACTUAL ALLEGATIONS

11. Defendant has constantly and continuously placed collection calls to Plaintiff seeking and demanding payment for an alleged debt with the intent to annoy, abuse and/or harass him.

12. Beginning within the last four (4) years, and on multiple occasions since that time, Defendant contacted Plaintiff on his cellular telephones via an “automatic telephone dialing system,” as defined by 47 U.S.C. §227(a)(1).

13. During these telephone calls Defendant used "an artificial or prerecorded voice" as prohibited by 47 U.S.C. §227(b) (1) (A).

14. These telephone calls constituted calls that were not for emergency purposes as

1 defined by 47 U.S.C. §227(b) (1) (A) (i).

2 15. Plaintiff did not provide prior express consent to receive calls on his cellular
3 telephone, pursuant to 47 U.S.C. §227(b) (1) (A).

4 16. Defendant's misconduct in placing calls to Plaintiff's cell phone was willful and
5 knowing, and the Court should treble the amount of statutory damages recoverable to Plaintiff
6 pursuant to 47 U.S.C. §227(b)(3)(C).

7 17. These telephone calls by Defendant violated 47 U.S.C. §227(b) (1).

8 18. Plaintiff was harmed by the acts of Defendant including but not limited to causing
9 Plaintiff to incur certain cellular telephone charges or reduce cellular telephone time for which
10 Plaintiff previously paid.

11 19. Defendant knowingly and/or willfully violated 47 U.S.C. §227 *et seq.*,

12 **FIRST CLAIM FOR RELIEF**

13 **(Negligent Violations Of The Telephone Consumer Protection Act)**

14 20. Plaintiff incorporates by reference all of the above paragraphs of this Complaint
15 as though fully stated herein.

16 21. The foregoing acts and omissions of Defendant constitute numerous and multiple
17 negligent violations of the TCPA, including but not limited to each and every one of the above-
18 cited provisions of 47 U.S.C. §227 *et seq.*

19 22. As a result of Defendant's negligent violations of 47 U.S.C. §227 *et seq.*, Plaintiff
20 is entitled to an award of \$500.00 in statutory damages for each and every violation, pursuant to
21 47 U.S.C. §227(b) (3) (B).

22 23. Plaintiff is also entitled to and seeks injunctive relief prohibiting such conduct in
23 the future.

24 **SECOND CLAIM FOR RELIEF**

25 **(Knowing And/Or Willful Violations Of The Telephone Consumer Protection Act)**

26 24. Plaintiff incorporates by reference all of the above paragraphs before his First
27 Count for Relief as though fully stated herein.

28 25. The foregoing acts and omissions of Defendant constitute numerous and multiple

1 knowing and/or willful violations of the TCPA, including but not limited to each and every one
2 of the above-cited provisions of *47 U.S.C. §227 et seq.*

3 26. As a result of Defendant's knowing and/or willful violations of *47 U.S.C. §227 et*
4 *seq.*, Plaintiff is entitled to an award of \$1,500.00 in statutory damages for each and every
5 violation, pursuant to *47 U.S.C. §227(b) (3) (B)* and *47 U.S.C. §227(b) (3) (C)*.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff prays that judgment be entered against Defendant, and for
8 Plaintiff, and pray for the following relief:

- 9 (1) Assume jurisdiction in this proceeding;;
- 10 (2) Declare that the Defendant violated the TCPA;
- 11 (3) Award of statutory damages of \$1,500.00 for each and every knowing
12 and/or willful violation of the TCPA, pursuant to *47 U.S.C. §227(b)(3)(B)*
13 and *47 U.S.C. §227(b)(3)(C)*
- 14 (4) Award of statutory damages of \$500.00 for each and every negligent
15 violation of the TCPA, pursuant to *47 U.S.C. §227(b) (3) (B)*
- 16 (5) Such other and further relief this court may deem just and proper.

17 **TRIAL BY JURY**

18 27. Pursuant to the seventh amendment to the Constitution of the United States of
19 America, Plaintiff is entitled to, and demands, a trial by jury.

20
21 April 16, 2012
22 Dated

23 *s/Patric A. Lester*
24 By Patric A. Lester
25 Attorney for Plaintiff,
26 David Vaccaro
27
28

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

DAVID VACCARO

(b) County of Residence of First Listed Plaintiff Los Angeles
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Patric A. Lester, Lester & Associates, 5694 Mission Center Rd. #358,
San Diego, Ca., 92108 (619)-665-3888

DEFENDANTS

STERLING JEWELERS, INC., an Ohio corporation d/b/a KAY JEWELERS

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

'12CV0924 W WMc**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

Citizen of This State	<input type="checkbox"/> PTF 1	<input type="checkbox"/> DEF 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> PTF 4	<input type="checkbox"/> DEF 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine Liability	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	SOCIAL SECURITY	<input checked="" type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 390 Other Personal Injury	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 470 Railway Labor Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise		Habeas Corpus:	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	FEDERAL TAX SUITS	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 550 Civil Rights		<input type="checkbox"/> 900Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 555 Prison Condition		<input type="checkbox"/> 950 Constitutionality of State Statutes
	<input type="checkbox"/> 440 Other Civil Rights			

V. ORIGIN

(Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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VI. CAUSE OF ACTIONCite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
47 U.S.C. §277 et seq 28:1331 - Federal Question (JMD)

Brief description of cause: violations of the Telephone Consumer Protection Act

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$ 75,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

April 16, 2012

/s/ Patric A. Lester

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE